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**IN THE  
COURT OF APPEALS OF INDIANA**

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PHILLIP BENSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0609-CR-526
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
CRIMINAL DIVISION 4  
The Honorable Patricia Gifford, Judge  
Cause No. 49G04-0503-FA-036830

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**June 29, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Appellant, Phillip Benson, pleaded guilty to Burglary as a Class A felony and was subsequently sentenced to forty years imprisonment. In this belated appeal, Benson argues that his sentence is inappropriate in light of the nature of his offense and his character.

We affirm.

According to the factual basis provided by the State at the guilty plea hearing, on the evening of March 4, 2005, J.R. was in the basement of her Indianapolis home watching television with her two-year-old grandson when she heard a knock on the door. Recognizing the individual at the door as Benson, a neighbor who lived down the street, J.R. opened the door slightly to speak with him. Benson asked J.R. if her son or daughter were home, and when J.R. replied that they were not, Benson forced the door open, ripped open J.R.'s robe, lifted her nightgown over her head, threw her to the ground, hit her, and then attempted to penetrate her vagina with his penis. J.R. grabbed a knife with which to defend herself and suffered a cut to one of her fingers. J.R.'s two-year-old grandson witnessed the incident. Upon seeing blood, Benson fled the scene.

On March 8, 2005, the State charged Benson with burglary as a Class A felony, attempted rape as a Class B felony, criminal deviate conduct as a Class B felony, and robbery as a Class C felony. On June 21, 2006, Benson entered into a plea agreement with the State in which he agreed to plead guilty to burglary as a Class A felony, and the State agreed to dismiss the remaining charges. Sentencing was left to the trial court's discretion, but with a cap of forty years with regard to the executed portion of the sentence. On July 5, 2006, the trial court accepted Benson's plea agreement and

proceeded to sentence him to forty years imprisonment.<sup>1</sup> The court's sentencing statement follows:

“Well the Court has reviewed this and determined that there are aggravating circumstances by the fact just alone from your criminal history and secondly because this act was committed in the presence of her grandson - - that's an aggravating circumstance. There are mitigating circumstances because of the fact that you have shown remorse and have at least pled guilty and that you have been participating in programs while you're in the Marion County Jail, however, the Court finds the aggravating circumstances far outweigh the mitigating circumstances and pursuant to the plea agreement would sentence you to a period of 40 years.” Transcript at 25.

The court further recognized that a majority of Benson's arrests and convictions deal with alcohol and drugs and observed that with regard to the present incident, “the alcohol and drugs got the better of [him].” Transcript at 23. In an exchange with Benson, Benson admitted that he had twice sought treatment for his drug and alcohol problem, but requested that the court give him another chance. With permission from the trial court, Benson filed a belated notice of appeal on September 22, 2006.

Upon appeal, Benson argues that his sentence is inappropriate. Benson asserts that the aggravating circumstance of his criminal history is “ameliorated by the thirteen years between his last two convictions, the non-violent nature of those prior crimes, and the

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<sup>1</sup> In response to Blakely v. Washington, 542 U.S. 296 (2004), the legislature amended Indiana's statutory sentencing scheme, effective April 25, 2005, to provide for an advisory sentence rather than a presumptive sentence. Since Benson committed the instant offense prior to the effective date of the amendment, we apply the version of the statute then in effect. Specifically, Indiana Code § 35-50-2-4 (Burns Code Ed. Repl. 2004) provided, “A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.” Thus, Benson received an enhanced sentence—ten years above the presumptive.

exacerbating role that drug and alcohol abuse has played in his life.” Appellant’s Brief at 7.

Pursuant to Indiana Appellate Rule 7(B), we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” First, with regard to the nature of the offense, Benson admitted to forcing his way into the victim’s home and attempting to rape her. In his written version of the instant offense, which was included in the pre-sentence investigation report, Benson admits that on the evening in question, he had been smoking crack cocaine. We further note that Benson committed the instant offense in front of the victim’s two-year-old grandson, who was yelling at him to “please stop hurting my nanny.” Transcript at 8.

We next consider Benson’s character. As noted by the trial court, Benson has an extensive criminal history which consists of juvenile adjudications for theft and criminal mischief, and adult convictions for criminal conversion (two instances), operating a vehicle while intoxicated (two instances), theft, and auto theft. As urged by Benson, we recognize that thirteen years had elapsed since his last conviction. We further recognize that none of Benson’s prior convictions are for inherently violent crimes and, as also recognized by the trial court, much of Benson’s criminal history involved alcohol and drugs. Nevertheless, it is also clear from the record that with regard to sentencing for his prior offenses, Benson has been afforded leniency in the form of probation but has failed take advantage of such, having his probation revoked numerous times. Further, despite his many run-ins with the criminal justice system, Benson has failed to conform his

conduct to the law. Additionally, we note that Benson admitted that he has a lifelong drug and alcohol problem and that he has failed at prior attempts at treatment for such problems. Benson's pattern of conduct demonstrates that he is unlikely to be rehabilitated of his own volition and that he is in need of placement in a structured environment.

In light of the nature of the offense and the character of the offender, we cannot say that the sentence imposed—the presumptive sentence plus ten years—is inappropriate.

The judgment of the trial court is affirmed.

ROBB, J., and VAIDIK, J., concur.